IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 12..09.2006

CORAM:

THE HON'BLE MR.JUSTICE M. THANIKACHALAM

S.A.NO.331 OF 1995

Kuppanna Pannadi ..Appellant.(Defendant)

vs.

1. Rajammal
2. Amaravathi Ammal
3. Nachiammal
4. Anayakkal ..Respondents.

Appeal filed under Section 100 C.P.C. against the decree and judgment dated 9.12.1994 made in A.S.No.60 of 1992 on the file of the Sub Court, Udumalpet setting aside the decree and judgment dated 30.4.1990 in O.S.No.649 of 1988 of the District Munsif of Udumalpet.

For Appellant : Mr. V. Manohar for Mr. S. Ramalingham
For Respondents 1, 2 and 4 : Mr. V. Nicholas
Respondent 3 : Dismissed vide order dated 23.12.1996

J U D G M E N T

The defendant is the appellant.

2. The plaintiffs/respondents are the legal heirs of one Thukkaiya Pannadi, who is the son of Palani Pannadi, who owned the suit property originally. After the death of Palani Pannadi, his heir Thukkaiya Pannadi rented the suit property orally to the defendant for a monthly rent of Rs.15/-. After the death of Thukkaiya Pannadi, the plaintiffs, as his legal heirs, though requested the defendant to vacate the premises, since he had failed to pay the rent, the defendant/appellant refused to do so claiming as if he had purchased the property orally from the father of the plaintiffs. On the basis of the above allegations, a suit came to be filed on the file of the District Munsif, Udumalpet for declaration of the plaintiffs' title to the suit property, for possession and for recovery of Rs.15/- as damage per month from the date of the plaint till the date of delivery of possession.

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3. In the written statement as well as in the additional written statement, the defendant would contend, that the present building available in the suit property was constructed by this defendant, in which the plaintiffs have no right, since neither Palani Pannadi nor Thukkaiya Pannadi had constructed the building, that elsewhere in the year 1970 as per the market price available then, this defendant had purchased the site for Rs.75/-, for which there was an unregistered document also, that the alleged tenancy, as if this defendant had agreed to pay Rs.15/- per month and is in possession as tenant is a myth, invented to explain the possession, that the suit filed by the present plaintiffs is not maintainable, since the plaint would read as if there are other heirs also, that the plaintiffs are neither entitled to declaration nor possession, including the damages and that the suit is barred by limitation, since the defendant had prescribed title to the suit property by adverse possession being in possession continuously adversely for the past 18 years, thereby praying for the dismissal of the suit.

4. The learned District Munsif framing as many as four issues covering title, possession, profits took the case for trial, wherein the parties have marked Exs.A1 to A4 and Exs.B1 to B10, in addition to the examination of P.Ws.1 to 3 and D.W.1. The evaluation of the above materials, based upon possession, brought to surface, that the defendant is not occupying the property as tenant, that the defendant had prescribed title to the suit property by adverse possession, though he has failed to prove the alleged sale and this being the position, question of declaration or other consequential relief would not arise for consideration. In this view, the suit came to be dismissed on 30.4.1990, which was challenged before the first appellate Court in A.S.No.60/92 on the file of the Sub Court, Udumalpet.

5. The learned Subordinate Judge reassessing the evidence once again, as he is bound to reassess and hearing the submissions of either counsel felt, that the trial Court has not properly perused the evidence, whereas it had committed error. Taking a peculiar stand, as seen from paragraph-11 of the judgment, the first appellate Court came to the conclusion that since the defendant failed to prove the sale, it should be presumed or it should be held that he is occupying the property as tenant. It is the further conclusion of the learned first Appellate Judge, that though the defendant is in possession of the property, in view of the inconsistent stand taken by him viz., claiming title based upon the sale as well as on the basis of the adverse possession, which are not available, as seen from paragraph-13, upset the findings of the trial Court regarding adverse possession, thereby bringing the case within the period of limitation based upon title. Thus concluding the judgment and decree of the

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trial Court was reversed granting a decree as prayed for, as per the judgment dated 9.12.1994, which is impugned in this second appeal.

6. This Court, while admitting the second appeal, has formulated the following substantial questions of law for determination:

> "Whether the judgment of the lower Appellate Court reversing that of the trial Court is vitiated by its failure to consider the entire evidence on record and apply the correct principles of law?"

7. Heard the learned counsel for the appellant, Mr. V. Manohar and the learned counsel for the respondents, Mr. V. Nicholas.

8. Mr. V. Manohar, the learned counsel appearing for the appellant advanced an argument as if the claim of adverse possession by the defendant was not properly considered by the first appellate Court, though the same was considered by the trial Court in its well reasoned judgment and therefore that finding upset by the first Appellate Court should be upset by allowing this appeal, which is opposed by the learned counsel for the respondents/plaintiffs as if adverse possession claimed by the defendant was not available to him, that too in view of the inconsistent or mutually contradictory stand taken by him viz., claiming title on the basis of the sale, as well as on the basis of adverse possession, since there would be absence of animus and hostility, which are the essential ingredients to extinguish the title of the owner.

9. In the written statement, the defendant has specifically pleaded adverse possession also as pointed out by the trial Court in para-7 of its printed judgment, though it failed to frame necessary issues, touching adverse possession. But the fact remains, the parties were fully aware of the fact on what basis the rights are claimed, either by the plaintiffs or by the defendant and in this view alone, evidence also has been adduced. Therefore, non framing of necessary issues certainly would not vitiate the findings of the trial Court, if it is otherwise legally sound.

10. Before, me it is the admitted case of the parties that the suit property, at least the site, originally belonged to Palani Pannadi, whose son is Thukkaiya Pannadi, whose LRs. are the plaintiffs. The defendant, at least admitting the title of Thukkaiya Pannadi regarding certain portion, has contended that he had purchased the property for Rs.75/- elsewhere in 1970 as per the market rate prevailed then, for which no registration is required. The above fact would go to show that the original title of the plaintiffs' predecessors-in-interest is admitted. But admittedly, the defendant is in possession of the suit property. In order to explain the possession with the defendant, an attempt is made in the plaint, as if the

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defendant is occupying the suit property or permitted to occupy the suit property as tenant on his agreeing to pay a monthly rent of Rs.15/- per month and some averments touching the tenancy are available in paragraph -4 of the plaint. No details are given such as when the tenancy commenced, what are the other terms of the tenancy, agreed rent, etc. Considering this fact as well as no proof is made available to prove the tenancy, including the payment of rent subsequently, in a well considered judgment, the trial Court disbelieved the tenancy, concluding that the defendant is occupying the property in his own right, whether it is pursuant to the sale or otherwise, which I will discuss infra also. Unfortunately, this finding is set aside as indicated supra in an erroneous assumption, not warranted under law.

11. The defendant, no doubt claimed title to the suit property by oral sale. The absence of proof regarding the oral sale as if it would lead to the presumption that there must be a tenancy is not based upon legal principle. But unfortunately, the first Appellate Court set aside the finding of the trial Court in this regard and presumed without evidence, that the defendant's possession is that of tenancy, which is liable to be erased. In this view of the matter, it is to be held that the defendant is occupying the property not as tenant, whereas his occupation should be in some other capacity.

12. Admittedly, even before the date of filing of the suit for more than 12 years, continuously the defendant is in possession and enjoyment of the same. Therefore, it is to be seen on the basis of the admitted possession whether that possession is adverse to the real owner, whether that possession had the effect of extinguishing the title of the plaintiffs or in other words, whether that possession vested absolute title with the defendant, on the basis of adverse possession, though its origin is illegal, but because of recognising the long possession, leading to title also.

13. The learned counsel for the respondents/plaintiffs submitted, that though the defendant has been in possession and enjoyment of the property for well over 12 years or so, they had no animus to enjoy the property adverse to the real owner and in fact, he has claimed title pursuant to the oral sale and this being the position, declaring that the defendant has prescribed title to the suit property by adverse possession or extinguishing the title of the plaintiffs by limitation, is not permissible under law. In aid of the above contention, various decision of the Courts were brought to my notice.

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14. Law mandates when the question is whether a particular person is the owner of a property, where it is proved or admitted that he is in possession, the burden is upon the person, who claims title over the suit property to prove that the person, who is in possession is not the owner. The possession sought to be explained by the plaintiffs, who affirm that they are the owners of the property, as that of tenant not accepted by the trial Court is not challenged before me. Therefore, it is to be held that the defendant is in possession of the property in his own right openly, continuously to the knowledge of the plaintiffs, also ever since the plaintiffs knew the actual physical possession of the property by the defendant, not recognising them as owner, since no rent has been paid or proved to have been paid, for long years, covering the period of limitation. Thus the essential ingredients necessary to constitute adverse possession are well available. Having this position, now we have to see whether the claim of the defendant/appellant on the basis of the oral sale alone will deprive his right to claim adverse possession.

15. It is a settled position of law, that possession of a person having no title in the property under invalid deed of transfer becomes prima facie adverse to that of the owner from the date of his entering into possession, when he continues in possession for a period of more than 12 years, then title by adverse possession accrues in favour of that person as owner.

16. In the plaint, there is no allegation when Thukkaiya Pannadi had leased out the property to the defendant/appellant, though it is said the same had taken place during his lifetime. It is also not stated when Thukkaiya Pannadi died. Therefore, we have to fall back upon the defence regarding the commencement of possession. Repeatedly it is said in the written statement that from 1970, pursuant to the sale, the defendant is in possession spread over for 18 years. This 18 years possession is not challenged or not explained. Therefore, in this view, it is to be held that on the date of filing of the suit, there was continuous possession of the suit property with the defendant for well over 18 years and the same must be pursuant to the sale, though it is not proved, since tenancy pleaded is not established as recorded by the trial Court, but erroneously upset by the first Appellate Court. Taking into account the burden of proof, as indicated above, I am constrained to hold that the defendant's possession of the property must be pursuant to the sale of the year 1970, whether it is valid or not and the said year should be taken as the commencement of period of limitation to find out the adverse possession or to find out whether the suit is barred by limitation. Even assuming the sale is not proved, since possession pursuant to the sale is to be taken into account, that possession should be presumed as adverse possession.

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17. As early as 1917, a Division Bench of Bombay High Court has held in Dawal Piranshah vs. Dharma Rajaram 1917 ILR Vol. XLI 550 that even if it is to be held no allegation of sale at all, the possession, at any rate, is adverse possession, which cannot be altered by defacto possession. In the case involved above, it seems the plaintiff claimed title to the suit property on the basis of an unregistered document, wherein possession also claimed pursuant to the same and that possession should be taken as adverse possession. Considering the above fact, it is held as follows:

> "We have not the date of the lease but it is common ground that its currency was at least eleven months and during that period at any rate the character of the plaintiffs' adverse possession could not have been altered by the de facto possession of the defendants. So that in any event it is clearly found that the plaintiffs have had more than twelve years adverse possession from May 1899 till some period very near the end of 1911; and the title thus acquired by adverse possession would be quite sufficient for all the purposes of the present suit even had there been no allegation of sale at all.",

which principle is well applicable to the present case.

18. In Rajaram vs. Ramanujam (AIR 1963 Madras 213 (V 50 C 83), it is held by a Division Bench of this Court that if a person came into possession pursuant to a void document, adverse possession starts from the date of alienation where transfer of possession had, thereby conferring title upon the person by adverse possession. In the case involved in the above decision, property belonging to a trust appears to have been alienated by the Manager, which is held to be void ab initio. However, the facts would disclose that possession was delivered to the transferee. Considering the above facts and circumstances of the case, the Division Bench has taken a view as seen from paragraph-5 of its judgment, which reads:

> ".....if the alienee has remained in possession for 12 years from the date of alienation he acquires title to the property by adverse possession. That conclusion is based upon the principle that a person in possession without lawful title always acquires title by adverse possession provided the other requisites for establishing adverse possession are present. In a case where a person purchases property from the manager of a choultry treating the property as the personal property of that individual (manager) he certainly professes to

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> hold the property not as a alienee from the manager but as alienee from the individual. In that case adverse possession starts from the very date of the alienation where transfer of possession was had. A suit to recover possession of such property after the alienee had perfected title by adverse possession would fail on the ground that the defendant had acquired title by adverse possession."

19. A Division Bench of Orissa High Court also has taken the similar view as seen from the decision in Govinda Jiew v. Surendra Jena (AIR 1961 Orissa 102 (V 48 C 44). Here also considering the void sale, the Bench has observed as follows:

> "If the sales or the transfers are void ab initio, then the transferees' possession since the date of the transfer becomes adverse from the date of the transfer inasmuch as the transferees had no right in respect of the properties at all. They were mere trespassers; and if by a continuous period of 12 years they have matured their rights, then the right would be available not only as against the transferor but against the whole world including the deity."

20. In Hemanta Kumari v. Iswar Sridhar Jiu (AIR (33) 1946 Calcutta 478 also, the same view was taken which reads:

> "If the transfer is void ab initio, the possession of the transferee is adverse from the very date of the transfer."

21. On the basis of the above rulings even assuming that there is no valid transfer of the property, in view of the admitted possession, it should be held that from the year 1970 onwards the defendant is in possession and enjoyment of the suit property and he having elected at present to claim adverse possession, it should be considered in his favour, since he had requisite animus and hostility to enjoy the property as his own and there cannot be any doubt in this regard.

22. The decision relied upon by the learned counsel for the respondents in Marappa Gounder (deceased) & others v. Ramalingam (deceased) & others (2002-4-L.W.300) is not factually applicable to the case on hand, since it was made out in the case involved in the above decision, that the person who claimed title to the property by adverse possession was admittedly sticking on to the stand that in view of the oral exchange, the parties were in possession of the suit

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property.

23. As held by the Apex Court in Annasaheb Bapusaheb Patil v. Balwant Babusaheb Patil, the defendant has shown that his possession was hostile to the real owner and amounted to denial of his title to the property claimed. Further the attempt made by the plaintiff to show the possession of the defendant is referred to a lawful origin also failed and in this view, it should be construed that his possession must be adverse, extinguishing the title of the original owner conferring the title in favour of the person who is in enjoyment of the property.

24. Alternative defence of adverse possession can be pleaded, even as seen from the decision reported in S.M.Karim v. Bibi Sakina (AIR 1964 SC 1254) and the essential conditions are that the alternative claim must be clearly made and proved.

25. In the case on hand, as pointed out, adverse possession, as an alternative relief pleaded, then the hostile enjoyment is also made out even to the knowledge of the real owner, by considering the plea of permissive possession pleaded not made out. Therefore, it should be held unhesitatingly that the defendant has prescribed title to the suit property by adverse possession ignoring the sale pleaded by him. In view of the admitted possession of the property with the defendant and at no point of time, the defendant had recgnised after 1970 the plaintiff was the real owner, this should lead only to the presumption that the possession is adverse, which are not properly considered, by either courts. Thus analysing the case from all possible angles based upon the above decision as well as based upon the admitted facts as well as the proved facts, I should conclude that both the Courts have failed to consider the entire evidence on record and apply the correct principles of law, leading to miscarriage of justice, involving substantial questions of law as raised and the same deserves to be answered in favour of the appellant.

The result, therefore, is the appeal is allowed setting aside the decree and judgment of the courts below and dismissing the suit in O.S.No.649 of 1988 on the file of District Munsif of Udumalpet. Considering the facts and circumstances of the case, the parties are directed to bear their respective costs throughout.

Sd/
Asst.Registrar

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Sub Asst.Registrar

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To

1. The Subordinate Judge
   Udumalpet

2. The District Munsif
   Udumalpet

3. The Record Keeper,
   V.R. Section, High Court,
   Madras.

+ one cc to Mr. V. Nicholas, Advocate sr no. 42259

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